No. 04-19-00192-CR
No. 04-19-00193-CR

IN THE COURT OF APPEALS
FOURTH JUDICIAL DISTRICT
AT SAN ANTONIO, TEXAS

JOHNNY JOE AVALOS.

Appellant

VS.

THE STATE OF TEXAS

Appellee

ON APPEAL FROM THE 437th DISTRICT COURT
BEXAR COUNTY, TEXAS

MOTION FOR REHEARING *EN BANC*

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.,
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com
SBN: 00783557

ORAL ARGUMENT REQUESTED

MOTION FOR REHEARING *EN BANC*

A. Introduction

Johnny Joe Avalos's Eighth Amendment, as-applied challenge to the constitutionality of Texas Penal Code section 12.31(a)(2) was rejected by a majority panel decision from Justices Chapa and Alvarez, with a dissenting opinion by Justice Martinez.

In its opinion, a panel majority correctly identified the sole question before it as "whether [Texas Penal Code] section 12.31(a)(2)'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel and unusual as applied to intellectually disabled persons." *Avalos v. State*, Nos. 04-19-00192-CR, 04-19-00193-CR, 2020 Tex. App. LEXIS 4118 at *2 (Tex. App.—San Antonio June 3, 2020) (Opinion at *2). As further noted by the panel majority, "Avalos argues the decisions of the Supreme Court of the United States under the Eighth Amendment compel the conclusion that section 12.31(a)(2) is unconstitutional as applied to intellectually disabled persons." Opinion at *2.

Acknowledging that "[t]he Supreme Court of the United States, the Texas Court of Criminal Appeals, and this court have not yet addressed whether an automatic life sentence without parole, imposed upon an

intellectually disabled person, is unconstitutionally cruel and usual," the panel majority submitted two reasons for denying Avalos relief.

First, it found persuasive the ruling in *Parsons v. State*, No. 12-16-00330-CR, 2018 Tex. App. LEXIS 5898 (Tex. App.—Tyler July 31, 2018), an unpublished opinion that discussed *Miller v. Alabama's* five-part test, when the United States Supreme Court declared that a life without parole (LWOP) sentence constituted cruel and unusual punishment under the Eighth Amendment, when applied to juvenile offenders.

Second, it rejected Avalos's constitutional challenge on "an additional point of distinction," namely, Avalos's apparent failure to "provide the trial court…with any citations, discussion, or analysis of objective evidence of evolving standards of decency, such as the sentencing laws or practices of other states." Opinion at *12-13. (Citing TEX. R. APP. P. 38.1(i); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (considering such objective evidence of evolving standards of decency)). The Court "disagree[d] with Avalos's specific contention on appeal, namely that the Supreme Court's decisions compel the conclusion that an automatic life sentence without parole is unconstitutional as applied to intellectually disabled persons," adding that "[w]ithout the objective evidence necessary to resolve Avalos's Eighth Amendment issue, we cannot say, in the first instance, that such a punishment

is unconstitutionally cruel and unusual under either the U.S. Constitution or the Texas Constitution." Opinion at *13.

B. Grounds for *En Banc* Rehearing

Mr. Avalos seeks *en banc* reconsideration by this Court on two grounds:

1. The Panel Majority Limited Itself to the Five-Part Test in Miller to Reject Avalos's Argument

After summarizing the holdings of several critically important decisions that were argued by Avalos in support of his argument (*Atkins v. Virginia*, 536 U.S. 304 (2002), Opinion at *4-5; *Roper v. Simmons*, 543 U.S. 551 (2005), Opinion at *5-6; *Graham v. Florida*, 560 U.S. 48 (2010), Opinion at *6-7; *Miller v. Alabama*, 567 U.S. 460 (2012), Opinion at *7-8), the Court (correctly) rejected the State's reliance on *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Opinion at *8), and concluded that "Avalos's position therefore turns on the strength of the analogy between intellectually disabled persons and juveniles under the Eighth Amendment." Opinion, at *11. While the analogy is certainly an important part of Avalos's analysis, it was far from the only one. Rather than discuss how precedent from *Atkins*, *Roper*, *Graham* and *Miller*, *in their combined totality*, are relevant to Avalos's argument, the panel

majority limited itself to applying the five-part test in *Miller* [1] to Avalos's facts, finding, as its lone vehicle, the Tenth Court of Appeals unpublished *Parsons* opinion. There are two problems with this approach.

First, and as noted, while the equivalence between Avalos's intellectual disability and the mental processes of juveniles is an essential part of Avalos's challenge, it was but a part of a larger argument. In her dissenting opinion, Justice Martinez recognized the fallacy in the panel majority's approach, to limit its cruel and unusual punishment analysis to *Miller's* five-part test, and accept *Parsons* as sufficiently persuasive authority to do so. Rather, and unlike the panel majority, Justice Martinez carefully navigated the holdings in *Atkins*, *Roper*, *Graham* and *Miller*, and concluded that "[b]y linking precedent in this manner," their combined holdings provided strongly woven authority to sustain Avalos's constitutional challenge. Dissenting Opinion at *17. The panel majority was content to make a passing reference to *Atkins*, *Roper*, *Graham* and *Miller's* holdings, ignored their combined significance to

[1] (1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. *See Miller* at 471-475; *Parsons* at *12-13.

Avalos's facts, and limited itself to feed Avalos's facts into each of *Miller's* five elements.

Second, *Parsons* is not precedent, nor should it serve as persuasive authority to reject Avalos's contention. *Parsons* did not discuss the aggregate holdings in *Atkins*, *Roper*, *Graham* and *Miller*, but in a wholly cursory fashion wrote that "[it knew] of no reason to believe that [*Miller's* five-factor test applied] to intellectually disabled offenders," when determining the constitutionality of a LWOP sentence on an intellectually disabled female convicted of capital murder. This constituted the entirety of that panel's treatment of Parson's cruel and unusual punishment challenge. In like fashion, this Court's panel majority simply quoted *Parsons* as authority for this proposition.

But the panel majority's opinion is also materially deficient in an additional, critical respect.

2. The Panel Majority Erroneously Required a Discussion of The Sentencing Laws or Practices of Other States

The panel majority faulted Avalos' failure to provide any citations, discussion, or analysis of objective evidence [2] of evolving standards of

[2] Avalos in fact did present "objective evidence necessary to resolve Avalos's Eighth Amendment issue (Opinion at *13)," specifically, the medical findings by Drs. Joan Mayfield and John Fabian, neuropsychologists appointed by the district court to assist in Avalos's defense. Dr. Mayfield provided detailed testing to support school grade and age equivalence between juveniles and Avalos. *See* Opening Brief (OB) pages 4-11; 23. For

decency, such as the sentencing laws or practices of other states. But a careful review of *Miller* shows that the Supreme Court specifically rebuffed the State of Alabama's submission of a collection of legislative enactments from different states as a counter to Miller's arguments, when addressing the evolving standards of decency issue. In her dissent, Justice Martinez keenly pointed out the rejection of this approach by the majority in *Miller*, which explained that, because the Supreme Court's holding did not categorically bar a penalty for a class of offenders or type of crime, and its decision followed from precedent, the Court was not required to scrutinize legislative enactments from other states. Dissenting Opinion at *17 (citing *Miller*, 567 U.S. at 482-83). [3] Restated, because Avalos does not seek to categorically bar the imposition of a LWOP sentence, which is established precedent as it pertains to juvenile offenders under *Miller*, but rather invites precedent that only requires a process that considers mitigating and other evidence before a

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his part, Dr. Fabian opined that Avalos was "functioning more like an 8-year old due to his intellectual disability," elaborating that "Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness." OB ps. 13-15; 23. Through this medical evidence, Avalos drew a clear parallel between the intellectual capacity and other mental processes of juveniles, and adults like Avalos who suffer from intellectual disability and specifically identified mental illnesses. None of this objective evidence was discussed by the majority panel in its opinion.

[3] It is noteworthy that the State did not, in its response briefing, raise an apparent failure to discuss legislative enactments, as necessary to present Avalos's constitutional challenge.

LWOP sentence can be imposed (*also Miller*), a discussion about our states's laws on the subject - at the time deemed necessary in *Graham* and *Atkins* - is not required to address Avalos's challenge. [4]

C. Conclusion

Respectfully, the panel majority's analysis is both misdirected, and incomplete. Mr. Avalos's issue of first impression and of great significance to our state's criminal jurisprudence should be reheard by this court, *en banc*.

D. Prayer

WHEREFORE, the Appellant requests that the Court grant *en banc* rehearing, and that it set the respective briefing and oral argument deadlines.

Respectfully submitted,

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078355

[4] In its opinion, the panel majority included *Miller*, alongside *Graham* and *Atkins*, and other *Eighth Amendment* cases, as requiring a discussion about the states's laws to determine the subject of evolving standards of decency. Opinion at *12-13. But a closer look proves that while *Miller's* majority devoted some time to this discussion, it had already determined that a review of legislative enactments would be unnecessary to determine the merits of *Miller's* constitutional challenge.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing *En Banc* was served upon the Bexar County District Attorney's Office, in San Antonio, Texas by email, on the 10th day of August, 2020.

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078355

CERTIFICATE OF COMPLIANCE

In accordance, and in compliance with Tex. R. App. P. 9.4(i)(2)(D), I hereby certify that this Motion for Rehearing *En Banc* contains 1,462 words, which have been counted by use of the *Word* program with which this brief was written.

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078355

APPENDIX

Avalos v. State

Court of Appeals of Texas, Fourth District, San Antonio

June 3, 2020, Delivered; June 3, 2020, Filed

Nos. 04-19-00192-CR & 04-19-00193-CR

Reporter
2020 Tex. App. LEXIS 4118 *

John Joe AVALOS, Appellant v. The STATE of Texas, Appellee

Prior History: [*1] From the 437th Judicial District Court, Bexar County, Texas. Trial Court Nos. 2016-CR-10374, 2018-CR-7068. Honorable Lori I. Valenzuela, Judge Presiding.

Disposition: AFFIRMED.

Core Terms

sentence, disabled, juveniles, parole, offenders, cruel, automatic, adults, unconstitutionally, plurality, murder, proportionality, mitigating, decency, culpability, quotations, evolving

Case Summary

Overview

HOLDINGS: [1]-The court held that the U.S. Supreme Court's decisions in Atkins, Roper, Graham, and Miller did not compel the conclusion that *Tex. Penal Code Ann. § 12.31(a)(2)* was unconstitutional as applied to intellectually disabled persons. Having been provided no objective evidence of evolving standards of decency required to analyze whether the punishment was unconstitutional, the court could not say defendant's sentences of an automatic life sentence without parole for a person were unconstitutionally cruel and unusual punishments.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > Capital Murder > Penalties

HN1[] **Capital Murder, Penalties**

Capital life is a reference to *Texas Penal Code Ann. § 12.31(a)(2)*'s requirement of an automatic life sentence without parole for a person convicted of capital murder, when the death penalty is not imposed. *§ 12.31(a)(2)*.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN2[] **Sentencing, Cruel & Unusual Punishment**

The *Eighth Amendment to the U.S. Constitution* prohibits cruel and unusual punishments. *U.S. Const. amend. VIII*. *Tex. Const. art. I, § 13* also prohibits punishments that are cruel and unusual. There is no significance in the difference between the Eighth Amendment's cruel and unusual phrasing and the cruel or unusual phrasing of Art. I, § 13.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN3[] **Sentencing, Cruel & Unusual Punishment**

The cruel and unusual standard is based on a precept of justice that punishment for a crime should be graduated and proportioned to the offense. Proportionality is informed by objective evidence of contemporary values. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. A court must also consider reasons for agreeing or disagreeing with their judgment in light of evolving standards of decency.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN4[] **Sentencing, Cruel & Unusual Punishment**

In Atkins v. Virginia, the U.S. Supreme Court held the imposition of the death penalty on an intellectually disabled person is unconstitutionally cruel and unusual.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN5[] **Sentencing, Cruel & Unusual**

Punishment

The U.S. Supreme Court held that sentencing intellectually disabled persons to death did not substantially further two bases for imposing the death penalty: retribution and deterrence. With respect to retribution, the Supreme Court explained that because only the most deserving of execution are put to death, an exclusion for the intellectually disabled is appropriate. With respect to deterrence, the Supreme Court explained the availability of the death penalty for intellectually disabled persons, who often act impulsively, would likely not deter them from murderous conduct, and excluding intellectually disabled persons from eligibility for the death penalty would not undermine the deterrent effect the death penalty has on others. The Supreme Court also considered that intellectually disabled persons generally face a special risk of wrongful execution due to an increased risk of false confessions, they generally have lesser abilities to communicate with counsel and to make a persuasive showing of mitigation to the jury, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. The Supreme Court therefore held the death penalty is cruel and unusual when imposed on an intellectually disabled person.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN6 **Sentencing, Capital Punishment**

In Roper v. Simmons, the U.S. Supreme Court held the death penalty is unconstitutionally cruel and unusual when imposed on a juvenile.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

HN7 **Sentencing, Capital Punishment**

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. The U.S. Supreme Court noted juveniles: (1) lack maturity and have an underdeveloped sense of responsibility; (2) are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) have a relatively unformed character. The Supreme Court explained the penological justifications for the death penalty apply to juveniles with lesser force than to adults. Quoting Atkins, the Supreme Court concluded that the same conclusions follow from the lesser culpability of the juvenile offender.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN8 **Sentencing, Age & Term Limits**

In Graham v. Florida, the U.S. Supreme Court extended Eighth Amendment protections for juveniles in the context of automatic life sentences without parole for nonhomicide offenses.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

HN9[] **Sentencing, Capital Punishment**

The U.S. Supreme Court has stated that life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The Supreme Court explained a life sentence without parole denies all hope of release and means good behavior and character improvement are immaterial. The Supreme Court also explained such a punishment is especially harsh for juveniles who will on average serve more years and a greater percentage of life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN10[] **Sentencing, Age & Term Limits**

In Miller v. Alabama, the U.S. Supreme Court extended Graham to include life sentences without parole for homicide offenses, holding that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. The Supreme Court noted that Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing and explained that deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. The Supreme Court concluded juveniles are entitled to an individualized sentencing determination in which a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN11[] **Sentencing, Cruel & Unusual Punishment**

Not a single U.S. Supreme Court decision has held an automatic life sentence without parole is unconstitutionally cruel and unusual when imposed on an intellectually disabled person.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN12[⬇] **Sentencing, Capital Punishment**

Although some of the reasoning behind the U.S. Supreme Court's decision in Miller might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not. These reasons include that (1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. The court knows of no reason to believe that these factors apply to intellectually disabled offenders.

Counsel: For APPELLANT: Jorge G. Aristotelidis, San Antonio, TX.

For APPELLEE: Andrew Warthen, Assistant Criminal District Attorney, San Antonio, TX.

Judges: Opinion by: Luz Elena D. Chapa, Justice. Dissenting Opinion by: Rebeca C. Martinez, Justice. Sitting: Rebeca C. Martinez, Justice, Patricia O. Alvarez, Justice, Luz Elena D. Chapa, Justice.

Opinion by: Luz Elena D. Chapa

Opinion

In these two appeals, we are presented with a single issue of first impression: When an intellectually disabled person is convicted of capital murder, and the State does not seek the death penalty, is an automatic life sentence without parole unconstitutionally cruel and unusual? Based on the record and arguments before us, we cannot say the imposition of such a punishment is unconstitutional as applied to all intellectually disabled persons in every case. We therefore affirm the trial court's judgments.

PROCEDURAL BACKGROUND

Under a plea agreement, Johnny Joe Avalos, an adult, pled guilty to two charges of capital murder. The State did not seek the death penalty. In the plea agreements, Avalos and the State mutually agreed and recommended that punishment be assessed at "capital life." ***HN1***[⬆] "Capital life" is a

reference to *Texas Penal Code section 12.31(a)(2)*'s requirement **[*2]** of an automatic life sentence without parole for a person convicted of capital murder, when the death penalty is not imposed. *See Tex. Penal Code § 12.31(a)(2)*.

Avalos filed motions challenging the constitutionality of his automatic life sentences without parole. He argued the Supreme Court of the United States' decisions under the *Eighth Amendment* prohibit the imposition of such a sentence on intellectually disabled persons. The trial court denied Avalos's motions, accepted his guilty pleas, found him guilty of both capital murder offenses, and pronounced his life sentences in open court. Avalos timely perfected appeal.[1]

THE CONSTITUTIONALITY OF *SECTION 12.31(A)(2)* AS APPLIED TO INTELLECTUALLY DISABLED PERSONS

Avalos's sole issue is whether *section 12.31(a)(2)*'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel and unusual as applied to intellectually disabled persons. Avalos argues the decisions of the Supreme Court of the United States under the *Eighth Amendment* compel the conclusion that *section 12.31(a)(2)* is unconstitutional as applied to intellectually disabled persons.

A. Cruel & Unusual Punishments

HN2[↑] The *Eighth Amendment to the U.S. Constitution* prohibits cruel and unusual punishments. *U.S. Const. amend. VIII*. *Article I, section 13, of the Texas Constitution* also prohibits punishments that are cruel and unusual. *Tex. Const. art. I, § 13* **[*3]** . There is "no significance in the difference between the *Eighth Amendment's* 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of *Art. I, Sec. 13 of the Texas Constitution.*" *Cantu v. State, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997)*.

HN3[↑] The "cruel and unusual" standard is based on "a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)* (internal quotation marks omitted). Proportionality is informed by objective evidence of contemporary values. *Id. at 312*. "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* A court must also "consider reason[s] for agreeing or disagreeing with their judgment" in light of "evolving standards of decency." *Id. at 313, 321*.

The Supreme Court of the United States, the Texas Court of Criminal Appeals, and this court have not yet addressed whether an automatic life sentence without parole, imposed upon an intellectually disabled person, is unconstitutionally cruel and usual. Avalos argues such a conclusion

[1] After oral argument, we granted the parties' joint motion to abate these appeals for the trial court to make an express finding as to whether Avalos is intellectually disabled. The trial court made findings in both cases that Avalos is intellectually disabled.

logically follows from the Supreme Court's *Eighth Amendment* decisions. Because there is no significant difference between the Texas Constitution and U.S. Constitution on this issue, we address Avalos's issue in light of the Supreme Court's decisions. *See Cantu, 939 S.W.2d at 645*. We also consider the decisions of other courts applying these *Eighth Amendment* decisions for **[*4]** their persuasive value.

B. Relevant Supreme Court Decisions

HN4[⬆] In *Atkins v. Virginia*, the Supreme Court held the imposition of the death penalty on an intellectually disabled person is unconstitutionally cruel and unusual. *536 U.S. at 321*. The Supreme Court first considered the acts of several state legislatures to exclude intellectually disabled persons from eligibility for the death penalty. *Id. at 313-17*. ***HN5***[⬆] The Supreme Court also held that sentencing intellectually disabled persons to death did not substantially further two bases for imposing the death penalty: retribution and deterrence. *Id. at 318-19*. With respect to retribution, the Supreme Court explained that because "only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate." *Id. at 319*. With respect to deterrence, the Supreme Court explained the availability of the death penalty for intellectually disabled persons, who often act impulsively, would likely not deter them from "murderous conduct," and excluding intellectually disabled persons from eligibility for the death penalty would not undermine the deterrent effect the death penalty has on others. *Id. at 319-20*. The Supreme Court also considered that intellectually disabled persons **[*5]** generally "face a special risk of wrongful execution" due to an increased risk of false confessions, they generally have lesser abilities to communicate with counsel and to make a persuasive showing of mitigation to the jury, and "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id. at 320-21*. The Supreme Court therefore held the death penalty is cruel and unusual when imposed on an intellectually disabled person. *Id. at 321*.

Although the Supreme Court has not considered the imposition of an automatic life sentence without parole as applied to intellectually disabled persons, Avalos argues the Supreme Court's decisions regarding juveniles guides our resolution of these appeals. ***HN6***[⬆] In *Roper v. Simmons*, the Supreme Court held the death penalty is unconstitutionally cruel and unusual when imposed on a juvenile. *543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*. As in *Atkins*, the Supreme Court began by considering "[t]he evidence of national consensus against the death penalty for juveniles." *Id. at 564*. ***HN7***[⬆] "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id. at 569*. The Supreme Court noted juveniles: (1) lack maturity and have **[*6]** an underdeveloped sense of responsibility; (2) "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure";

and (3) have a relatively unformed character. *See id. at 569-70*. The Supreme Court explained "the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id. at 571*. Quoting *Atkins*, the Supreme Court concluded, "The same conclusions follow from the lesser culpability of the juvenile offender." *Id.*

HN8[↑] In *Graham v. Florida*, the Supreme Court extended *Eighth Amendment* protections for juveniles in the context of automatic life sentences without parole for nonhomicide offenses. *560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*. In *Graham*, the Supreme Court relied on *Roper* to explain the diminished culpability of juveniles in light of the penological interests served by a life sentence without parole. *See id. at 67-69, 71-75*. ***HN9***[↑] The Supreme Court stated that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id. at 69*. The Supreme Court explained a life sentence without parole denies all hope of release and "means . . . good behavior and character improvement are immaterial." *Id. at 71*. The Supreme Court also explained such a punishment is "especially **[*7]** harsh" for juveniles who "will on average serve more years and a greater percentage of . . . life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id. at 70*.

HN10[↑] In *Miller v. Alabama*, the Supreme Court extended *Graham* to include life sentences without parole for homicide offenses, "hold[ing] that mandatory life without parole for those under the age of 18 at the time of their crimes violates the *Eighth Amendment's* prohibition on 'cruel and unusual punishments.'" *567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*. The Supreme Court noted, "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing" and explained that "[d]eciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth." *Id. at 471-73* (internal quotation marks omitted). The Supreme Court concluded juveniles are entitled to an individualized sentencing determination in which "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id. at 489*. Avalos argues intellectually disabled persons **[*8]** are entitled to the same type of individualized sentencing determination.

The State argues we are bound by the Supreme Court's decision in *Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)*. In *Harmelin*, the majority of the Supreme Court concluded the imposition of an automatic life sentence without parole for the offense of possession of 650 grams of cocaine was not cruel and unusual. *Id. at 961, 996*. The *Harmelin* plurality did not consider a proportionality review and considered the originally intended meaning of "cruel and unusual" in the *Eighth Amendment*. *See id. at 994-95*.

The plurality's approach differed from the approach taken in Justice Kennedy's concurrence, in which he reached the same conclusion as the plurality, except by emphasizing the proportionality of the sentence as opposed to the Framers' original intent. *Id. at 996-1001* (Kennedy, J., concurring).

C. Other Relevant Authorities

The parties also rely on decisions from other courts. Avalos principally relies on *People v. Coty, 2018 IL App (1st) 162383, 425 Ill. Dec. 47, 110 N.E.3d 1105 (Ill. App. Ct. 2018)*. In *Coty*, a jury convicted an intellectually disabled defendant as a repeat offender for sexual assault of a minor. *Id. at 1107-08*. An automatic life sentence without parole was assessed and, on appeal, the court of appeals reversed the sentence. *Id. at 1108*. The court held an automatic life sentence without parole was not facially unconstitutional **[*9]** under the *Eighth Amendment*, but was unconstitutional under Illinois's state constitution as applied to the defendant due to his intellectual disability. *See id.* On remand, the defendant was resentenced to 50 years in prison. *See id.* In the defendant's second appeal, the court of appeals noted the evolution in standards of decency required that the trial court consider evidence of the defendant's intellectual disability in sentencing. *Id. at 1121-22*. The court of appeals in *Coty* saw no reason why "the prohibition against the imposition of discretionary *de facto* life sentences without the procedural safeguards of *Miller* and its progeny should not be extended to intellectually disabled persons." *Id. at 1122*.

The State relies on *Parsons v. State*, in which the Tyler court of appeals considered and rejected the very same position Avalos takes in these appeals. *See No. 12-16-00330-CR, 2018 Tex. App. LEXIS 5898, 2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, pet. ref'd)* (mem. op., not designated for publication). The Tyler court reasoned that although there are some similarities between juveniles and intellectually disabled persons, the differences are too significant to extend the Supreme Court's precedents regarding juveniles, specifically *Miller*'s categorical bar to an automatic life sentence **[*10]** without parole, to intellectually disabled persons. *Id.* The State also relies on *Modarresi v. State*, in which the Houston court of appeals relied on *Harmelin* to reject a contention that *section 12.31(a)(2)* was unconstitutional as applied to someone suffering from "mental illness, particularly post-partum depression associated with Bipolar Disorder." *488 S.W.3d 455, 466 (Tex. App.—Houston [14th Dist.] 2016, no pet.)*. The court in *Modarresi* noted the Supreme Court in *Harmelin* held an automatic life sentence without parole is constitutional without exception. *See id.*

D. Analysis

Not a single Supreme Court decision directly controls the resolution of these appeals. Although the court of appeals in *Modarresi* treated *Harmelin* as controlling in all contexts, there is no indication that the appellant in *Harmelin* was intellectually

disabled. In other words, *Harmelin* is not controlling because it "had nothing to do with [intellectually disabled persons]." *Cf. Miller, 567 U.S. at 481* (declining to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children"). Furthermore, the Supreme Court in *Harmelin* was able to reach a majority in its ultimate holding, but the plurality and concurrence disagreed as to the appropriate legal principles and modes of constitutional interpretation, and **[*11]** the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins*. As one example, the *Harmelin* plurality rejected proportionality as a consideration and construed the *Eighth Amendment's* phrase "cruel and unusual" considering the original intent of the language as used in the 1700s. *See 501 U.S. at 965* ("[T]he *Eighth Amendment* contains no proportionality guarantee."). In *Atkins*, the Supreme Court considered proportionality and construed the phrase "cruel and unusual" in "evolving standards of decency" and "contemporary values." *See 536 U.S. at 311-12*.

HN11[⬆] Conversely, not a single Supreme Court decision has held an automatic life sentence without parole is unconstitutionally cruel and unusual when imposed on an intellectually disabled person. Avalos's position therefore turns on the strength of the analogy between intellectually disabled persons and juveniles under the *Eighth Amendment*. As to this analogy, the Tyler court's analysis in *Parsons* is persuasive:

> ***HN12***[⬆] Although some of the reasoning behind the Court's decision in *Miller* might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not. These reasons include that (1) juvenile offenders have greater prospects for reform than **[*12]** adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. We know of no reason to believe that these factors apply to intellectually disabled offenders.

*2018 Tex. App. LEXIS 5898, 2018 WL 3627527, at *5*. This analysis accounts for the Supreme Court's specific considerations in *Miller* and *Graham*, such as the difference in time actually served by a 16-year-old and a 75-year-old for identical "life" sentences, and the inconsistency of incorrigibility with youth. *See Graham, 560 U.S. at 70*; *Miller, 567 U.S. at 472-73*. Avalos's reasoning and the Illinois case he cites, *Coty*, do not adequately account for the significant differences between juvenile offenders and adults identified by the Supreme Court in *Miller* and *Graham*.

We also note an additional point of distinction. In *Graham* and *Miller*, as well as *Atkins* and other *Eighth Amendment* cases, the Supreme Court considered the laws enacted by states' legislatures.

Avalos **[*13]** did not provide the trial court, and has not provided us, with any citations, discussion, or analysis of objective evidence of evolving standards of decency, such as the sentencing laws or practices of other states. *See TEX. R. APP. P. 38.1(i)*; *Atkins, 536 U.S. at 311-12* (considering such objective evidence of evolving standards of decency). We disagree with Avalos's specific contention on appeal, namely that the Supreme Court's decisions compel the conclusion that an automatic life sentence without parole is unconstitutional as applied to intellectually disabled persons. Without the objective evidence necessary to resolve Avalos's *Eighth Amendment* issue, we cannot say, in the first instance, that such a punishment is unconstitutionally cruel and unusual under either the U.S. Constitution or the Texas Constitution.

CONCLUSION

We hold the Supreme Court's decisions in *Atkins*, *Roper*, *Graham*, and *Miller* do not compel the conclusion that *Texas Penal Code section 12.31(a)(2)* is unconstitutional as applied to intellectually disabled persons. Having been provided no objective evidence of evolving standards of decency required to analyze whether the punishment here is unconstitutional, we cannot say Avalos's sentences are unconstitutionally cruel and unusual punishments. We therefore overrule **[*14]** Avalos's sole issue in these appeals and affirm the appealed judgments.

Luz Elena D. Chapa, Justice

Dissent by: Rebeca C. Martinez

Dissent

DISSENTING OPINION

I dissent because the Constitution requires individualized sentencing for intellectually disabled defendants who face the most serious penalty the State can impose on them—a life sentence without parole. Although this is a case of first impression, our result should follow straightforwardly from *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*, and the Supreme Court's individualized sentencing cases.

In *Atkins*, the Supreme Court barred the execution of intellectually disabled individuals because the sentence is cruel and unusual punishment within the meaning of the *Eighth Amendment*. *Atkins, 536 U.S. at 321*. This decision falls within a line of cases striking down "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama, 567 U.S. 460, 470, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*; *Graham v. Florida, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*. Central to the Court's reasoning in these cases is "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller, 567 U.S. at 469* (quotations omitted). Intellectually disabled defendants are "categorically less culpable than the average

criminal." *Atkins, 536 U.S. at 316*.[1] Intellectually disabled individuals "frequently know **[*15]** the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id. at 318*. These impairments "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Roper v. Simmons, 543 U.S. 551, 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)* (citing *Atkins, 536 U.S. at 319-20*). Additionally, by nature of their diminished faculties, intellectually disabled defendants face an enhanced possibility of false confessions and a lessened ability to give meaningful assistance to their counsel. *Atkins, 536 U.S. at 320-21*.

Following *Atkins*, the Supreme Court decided that juvenile offenders, like intellectually disabled offenders, are in a class of defendants that is "constitutionally different" from other defendants for sentencing purposes. *Miller, 567 U.S. at 471*. Members of each class of defendants have diminished culpability compared to other offenders. *See Roper, 543 U.S. at 570-71*; *Atkins, 536 U.S. at 318-20*. While differences certainly exist, this fundamental similarity makes the imposition of the death penalty excessive for individuals **[*16]** in each group. *See Roper, 543 U.S. at 572-73*; *Atkins, 536 U.S. at 321*.

Acknowledging this fundamental similarity, I would follow the course adopted by *Miller*. The Supreme Court held in *Miller*, with respect to juvenile defendants, that a mandatory imposition of a life sentence without parole "runs afoul of . . . [the] requirement of individualized sentencing for defendants facing the most serious penalties." *Miller, 567 U.S. at 465*. For juveniles and the intellectually disabled, the most serious penalty is life imprisonment without parole; therefore, a life sentence without parole for these offenders is analogous to the death penalty. *See id. at 470, 476-478*; *see also Graham, 560 U.S. at 69* ("[L]ife without parole is the second most severe penalty permitted by law." (quotations omitted)). As with a death sentence, imprisonment until an offender dies "alters the remainder of [the offender's] life by a forfeiture that is irrevocable." *See Miller, 567 U.S. at 474-75* (quotations omitted).[2] Applying the analogy "makes relevant . . . a second line of [Supreme Court] precedents, demanding

[1] It is undisputed that Avalos is intellectually disabled or "mentally retarded," which is the term used in *Atkins*, which has since fallen out of favor. *See Atkins, 536 U.S. at 306*; *People v. Coty, 2018 IL App (1st) 162383, 425 Ill. Dec. 47, 110 N.E.3d 1105, 1107 n.1 (Ill. App. Ct. 2018)*.

[2] To be sure, a life sentence without parole may be "an especially harsh punishment for a juvenile[, who] will on average serve more years and a greater percentage of his life in prison than an adult offender," but the difference in severity of the sentence when applied to a juvenile compared to an adult is one of degree. *See Graham, 560 U.S. at 70*. In other respects, the disproportionality of the punishment can be similar if mitigating factors are not considered. Diminished culpability for juvenile offenders and intellectually disabled offenders lessens the penological justifications for a sentence of life imprisonment without parole, which can render the sentence disproportionate. *See id. at 71-74*; *Atkins, 536 U.S. at 318-20*.

individualized sentencing when imposing the death penalty." *See id. at 475*.

Applying death-penalty precedent on sentencing leads directly to the requirement that a defendant facing the most serious penalty must have an opportunity to advance mitigating **[*17]** factors and have those factors assessed by a judge or jury. *See id. at 489* ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also Woodson v. North Carolina, 428 U.S. 280, 304-05, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion) (holding that a statute mandating a death sentence for first-degree murder violated the *Eighth Amendment*). Extending the reasoning, here, requires that an intellectually disabled individual be allowed an opportunity to present mitigating evidence related to his intellectual disability before the sentencer may impose the most severe sentence of life imprisonment without parole. By linking precedent in this manner, I would impose a requirement of individualized sentencing without the need to review legislative enactments. *See Miller, 567 U.S. at 482-83* (explaining that because the Court's holding did not categorically bar a penalty for a class of offenders or type of crime and the decision followed from precedent, the Court was not required to scrutinize legislative enactments).

In short, I dissent because precedent controls. I would hold the trial court erred by denying Avalos an opportunity to present mitigating evidence **[*18]** before imposing the maximum sentence of life imprisonment without parole.

Rebeca C. Martinez, Justice

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Name	BarNumber	Email	TimestampSubmitted	Status
Joe D. Gonzales	8119125	j.gonzales@bexar.org	8/10/2020 3:45:12 PM	SENT